

CHARLES D. GRIECO, ESQ.

cgrieco@bsk.com

P: 716-416-7021

F: 716-416-7321

June 13, 2017

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

VIA ELECTRONIC MAIL Daly.Eric@epa.gov

Mr. Eric Daly
Response and Prevention Branch
U.S. Environmental Protection Agency, Region II
2890 Woodbridge Avenue, Bldg. 205 (MS-211)
Edison, NJ 08837

Re: *Request for Information Pursuant to Section 104 of CERCLA*
Holy Trinity Cemetery Site, 5401 Robert Street, Lewiston, Niagara County,
New York

Dear Mr. Daly:

I am writing on behalf of the Divine Mercy Roman Catholic Parish of Niagara Falls, NY ("Divine Mercy Parish"), which is the owner of the Holy Trinity Cemetery located at 5401 Robert Street, Lewiston, New York (the "Site"), in response to the Environmental Protection Agency's March 30, 2017 Request for Information Pursuant to Section 104 of the Comprehensive Response, Compensation and Liability Act ("CERCLA"). As indicated below, Divine Mercy Parish has very limited information concerning the existence of the radioactive material being investigated at the Site by EPA, but it has conducted a thorough review of records available to it and consulted with individuals most likely to possess any relevant information, and the responses below represent its best efforts to provide EPA whatever information Divine Mercy Parish possesses to assist with EPA's investigation.

Moreover, although EPA has not given any indication that it considers Divine Mercy Parish to be a responsible party with respect to such radioactive material, it should be stated that, by responding to EPA's March 30, 2017 letter, and providing the information below, Divine Mercy Parish is not admitting that it is liable with respect to the alleged environmental contamination released at or from the Site under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") or any other federal or state law, and Divine Mercy Parish specifically reserves the right to assert all available defenses to any assertion of such liability by the EPA or others.

Notwithstanding and without waiving the foregoing, Divine Mercy Parish, after conducting appropriate due diligence (including interviews with knowledgeable personnel and reviews of available documents) provides the following information in response to EPA's specific inquiries.

1. Please state the correct legal name and mailing address for the Divine Mercy Parish.

Response: Divine Mercy Roman Catholic Parish of Niagara Falls, NY, 2437 Niagara Street, Niagara Falls, New York, 14303.

2. Please provide a brief description of the operations and activities performed by the Divine Mercy Parish at the Site.

Response: Divine Mercy Parish operates the Holy Trinity Cemetery at the Site. Cemetery operations consist of maintaining the existing burial plots, establishing new burial plots and general maintenance of the Site.

3. State the dates during which the Divine Mercy Parish owned, operated, and/or leased any portion of the Site. If any individuals or entities other than Divine Mercy Parish owned, operated, and/or leased the Site property between 1958 and today, please identify these individuals and entities and the dates of their ownership, operation, and/or lease of the Site property.

Response: From prior to 1910 until 2008, the cemetery was owned and operated by Holy Trinity Roman Catholic Church Society of Niagara Falls, N.Y. ("Holy Trinity Parish") until Holy Trinity Parish (among others) was canonically merged into Divine Mercy Parish in 2008 and the Cemetery property was legally transferred to Divine Mercy Parish in 2012. Divine Mercy Parish has owned and operated the cemetery since that time.

4. Please identify the following individuals and entities:

- a. All Divine Mercy Parish and Holy Trinity Cemetery staff members (e.g., pastors, caretakers, and trustees) between 1958 and 1980;
- b. All individuals that resided at the Site between 1958 and 1980; and
- c. All contractors that performed work at the Site between 1958 and 1980.

Response: As noted above, Divine Mercy Parish has only owned and/or operated Holy Trinity Cemetery since 2008, and thus it has limited information concerning personnel associated with Holy Trinity Parish and Holy Trinity Cemetery during the period of 1958 through 1980. However, based on a review of available archival records and interviews

with knowledgeable individuals, the Pastor and Cemetery Administrator during that entire period was Rev. John Prackajlo, who is believed to be deceased. Divine Mercy Parish has not been able to confirm the identity of all of the on-site caretakers or employees of Holy Trinity Cemetery during that time period; however, Mr. John Strzelczyk, Cemetery Attendant at Holy Trinity Cemetery from 1990 to 2004, has indicated that prior Cemetery Attendants during the relevant time period included Mr. Bernard Tyran (from the late 1970s until 1990) and Mr. Eugene McCullum (during the 1970s). Divine Mercy Parish does not possess current contact information for either individual.

5. With respect to the radioactive slag materials that came to be located at the Site, provide any knowledge, information, and/or documents regarding the following:

- a. The approximate dates the radioactive material came to be located at the Site;
- b. The source of the radioactive material; and
- c. The individuals or entities involved in the generation, handling, storage, transportation, or disposal of the radioactive material.

Response: Divine Mercy Parish has no specific information or records regarding the radioactive slag materials that have been detected at the Site, other than materials that have been provided to it by EPA as part of its on-going investigation of the Site. However, enclosed herewith as **Attachment A** are copies documents indicating that fill material, apparently related to the construction of certain roadways on the Site, were brought to the Site in the early to mid-1960s, although these documents do not indicate the nature of this fill material. Also enclosed herewith as **Attachment B** is a site plan dated January 15, 1967, related to the construction of the Chapel at the Site, which identifies a "slag road" to the north and east of the Chapel.

6. Identify all individuals and entities that/who may have information or documents relating to the radioactive slag material that came to be located at the Site.

Response: Former Holy Trinity Cemetery Attendant John Strzelczyk has stated that he encountered materials he described as "cinders" while performing excavation and other work throughout the Site during his period of employment at Holy Trinity Cemetery, including in the vicinity of the "cemetery road" and "slag road" indicated on the **Attachment B**, in a garden maintained north of the Chapel, the roadway to the north of "Area 9" indicated on the "Soil Sample Location Map" enclosed herewith as **Attachment C**, and within "Area 2" and "Area 4" indicated on **Attachment C**. Other than information relayed by Mr. Strzelczyk, the documents enclosed herewith, and information or documents provided by EPA, Divine Mercy Parish possesses no additional information related to the existence of slag material at the Site.

7. Provide any knowledge, information, and/or documents related to current and/or prior earth-moving activities in and around the following features at the Site, which are identified in the enclosed New York State Department of Environmental Conservation Survey Map:

- a. The "Proposed Roadways";
- b. The "Original Slag Pile Id'd in 1980"; and
- c. The "Pile Exhibiting Elevated Readings".

Response:

a. As indicated in Response to Request No. 5, it appears that fill was brought unto the Site in the early to mid-1960s for the purpose of constructing certain roadways on the Site. In addition, as indicated in a document titled "Claimant's Proposed Findings of Fact", dated July 28, 1965, apparently submitted by Holy Trinity Parish in connection with a condemnation proceeding, a copy of which is enclosed as **Attachment D**, a road was constructed on the Site in 1957, although the location of that road and the source of any fill material associated with that road is unknown. See pp. 11-12 of **Attachment D**.

b. Mr. Strzelczyk recalls observing a debris pile consisting of various materials, including "cinders", drums and other indicia of industrial waste, in the vicinity of "Area 4" as indicated on **Attachment C**, that existed by the time he began his employment at the Site in 1990, but he is unaware of its origins.

c. It is not clear where the "Pile Exhibiting Elevated Readings" referenced in this Request is or was located on the Site, so Divine Mercy Parish cannot provide any additional information concerning this feature.

8. With respect to the roads at the Site and the "Proposed Roadways" referenced in Information Request Number 7.a., please:

- a. Indicate when these roads/roadways were constructed;
- b. Identify all persons and/or entities involved in the construction of the roads/roadways;
- c. Indicate the source of the fill materials used for the construction of the roads/roadways;
- d. Identify all individuals and entities that/who may have information or documents relating to the roads/roadways.

Response: See Response to Request No. 5, above. Divine Mercy Parish does not possess any additional information concerning this Request.

9. Indicate whether you have ever conducted an assessment, investigation, or cleanup of hazardous substances or wastes at the Site. If yes, please identify all environmental contractors and consultants hired to perform the work, describe the activities they conducted at the Site, and indicate the date(s) that the activities took place. Provide copies of all letters, reports, and conclusions issued by the contractors and consultants regarding the Site, including the names of the wastes that were disposed of and the location of disposal.

Response: Divine Mercy Parish has not conducted any assessment, investigation or cleanup activities of any hazardous substances at the Site.

10. Please answer the following questions concerning the involvement of State and local authorities at the Site:

- a. Describe any and all communications that you have had with State and/or local authorities concerning the radioactive material at the Site;
- b. Describe in detail any and all response work performed at the Site by a State or local agency concerning the radioactive material at the Site;
- c. Indicate whether any state or local agency ever transported, disposed of, and/or stored construction debris or radioactive material at the Site. If so, please describe where and the manner in which the debris/material was transported, disposed of, and/or stored.

Response: Divine Mercy Parish does not possess any information responsive to this request. It is not aware of any investigations, response actions, transport, disposal or storage of radioactive material at the Site by State or local authorities (or any other person or entity).

11. Please identify all individuals with knowledge of facts relating to the responses provided to this Request for Information. Please also identify each individual who assisted or was consulted or who answered on your behalf in the preparation of your response to this Request for Information, and specify the question with which each person assisted in responding.

Response: This response was prepared by Charles D. Grieco, Esq., who consulted with the following individuals: Father Jacek Mazur, Pastor of Divine Mercy Parish, Mr. Carmen Calao, Director of Cemeteries, Catholic Cemeteries of the Roman Catholic Diocese of Buffalo, Inc., and Mr. John Strzelczyk, Cemetery Attendant at Holy Trinity Cemetery from 1990 until 2004.

Eric Daly
June 13, 2017
Page 6

12. Please provide any additional information or documents that may help EPA identify parties that may have been a source of, or otherwise been responsible for, the radioactive material that came to be located at the Site.

Response: As noted above, Divine Mercy Parish possesses very little information concerning the origin or existence of the radioactive material detected at the Site, and what information it does possess is enclosed herewith or was provided by EPA.

Enclosed herewith as **Attachment E** is the Certification of Answers to Request for Information duly executed on behalf of Divine Mercy Parish by Fr. Jacek Mazur.

Very truly yours,

BOND, SCHOENECK & KING, PLLC



Charles D. Grieco

CDG/cjk

cc: Margo Ludmer, Esq. (via e-mail Ludmer.Margo@epa.gov)
Office of Regional Counsel
U.S. Environmental Protection Agency, Regency II
290 Broadway, 17th Floor
New York, NY 10007

ST. MARY'S ROMAN CATHOLIC CHURCH
259 4th Street
Niagara Falls, New York 14303

Phone (716) 282-0059

Fax (716) 282-3372

FAX TRANSMISSION

Deliver to: Charles GreicoFax #: 416-7321 Date: 6-14-17Number of pages (including cover: 2Comments: Original will be mailed today.From: Marie Flavin**Confidentiality Notice**

The information accompanying the Facsimile Cover Sheet contains privileged, personal and confidential information intended solely for the use of the individual or entity to which it is addressed. If the reader of this notice is not the intended addressee, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited.

If you have received this facsimile in error, please notify us by telephone immediately and either return the faxed information to the sender by US mail at the address listed on this facsimile, or dispose of the documentation by shredding.

Thank you.

Apr 11 17 12:17p

Divine Mercy R. C. Parish

716-284-6641

p.12

HOLY TRINITY CEMETERY
CERTIFICATION OF ANSWERS TO REQUEST FOR INFORMATION

State of New York :County of Niagara :

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document (response to EPA Request for Information) and all documents submitted herewith, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete, and that all documents submitted herewith are complete and authentic unless otherwise indicated. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment. I am also aware that I am under a continuing obligation to supplement my response to EPA's Request for Information if any additional information relevant to the matters addressed in EPA's Request for Information or my response thereto should become known or available to me.

REV. JACEK A. MAZUR
NAME (print or type)

PASTOR
TITLE (print or type)

Rev. Jacek A. Mazur
SIGNATURE

Sworn to before me this 14th
day of June, 2017

Marie Ann Marino
Notary Public

MARIE ANN MARINO
Notary Public State of New York
Appointed in Niagara County
My Commission Expires 2/28/19

C.A. WATSON ROADWAYS CORPORATION

"Durvia" Asphalt Pavement

BUFFALO 11, N. Y.

588 WINSLOW AVE.

HUMBOLDT 1428

For Parking Areas • Industrial Plants • Residences • Service Stations

Holy Trinity Roman Catholic Cemetary
Lewiston, N. Y.

October 11, 1962

Gentlemen:

We will furnish all labor, material and equipment to construct new entrance roadways according to plans and specifications furnished by your architect.

Price:

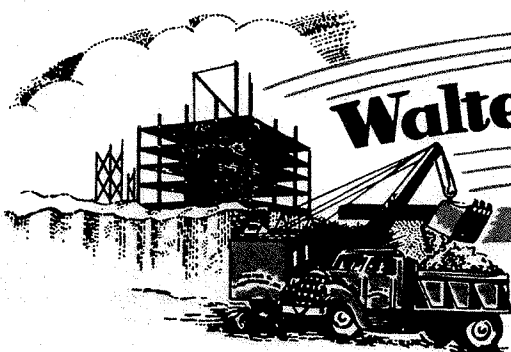
\$ 7947.00

C. A. Watson Roadways Corp.

Alexander Watson

President

Jf/ACW



Walter S. Kozdranski Co., inc.

TRUCKING · EXCAVATING · GRADING

OFFICE AND YARD

PHONE BU 3-8793 - CONNECTING ROAD - MAIN P. O. BOX 427 - NIAGARA FALLS, N. Y.

SOLD
TO

Holy Trinity Roman Catholic Church
1419 E. Falls Street
Niagara Falls, N.Y.

TERMS net 10 days

DATE June 14, 1963

INVOICE NO.

A 3516

DATE	DESCRIPTION
	Work at Holy Trinity Cemetery Loads of Fill, Top Soil & Bulldozer work spreading dirt:
	<u>Tandem loads dirt</u>
April 12	12
26	8
May 16	17
17	73
24	6
31	57
June 1	68
3	65
4	41
5	55
6	42
7	141
10	163
11	96
12	146
13	159
14	10
	<u>1159 loads @ \$7.50 per load \$8,692.50</u>
	<u>Equipment:</u>
May 17 -	D7 Bulldozer 8 hrs @\$16.50 hr \$132.00
	Tractor trailer 1 hr @\$15.00 hr 15.00
June 5 -	D7 Bulldozer 8 hrs @\$16.00 hr 132.00
	Tractor trailer 1 hr @\$15.00 hr 15.00
6 -	D7 Bulldozer 8 hrs @ \$16.50 hr 132.00
10 -	TD14 Bulldozer 8 hrs @ \$15.00 hr 120.00
	Tractor trailer 1 hr @\$15.00 hr 15.00
11 -	TD14 Bulldozer 8 hrs @ \$15.00 hr 120.00
12 -	TD14 Bulldozer 8 hrs @\$15.00 hr 120.00
13 -	TD14 Bulldozer 8 hrs @\$15.00 hr 120.00
	<u>\$9,613.50</u>

RECEIVED PAYMENT

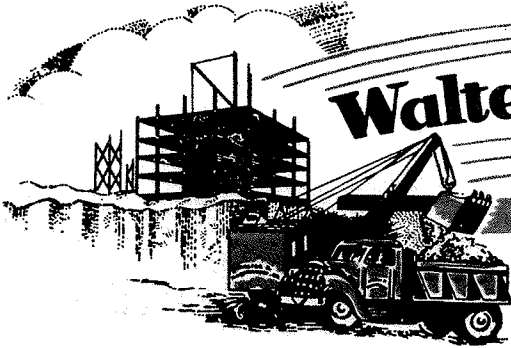
JUN 21 1963

WALTER S. KOZDRANSKI CO., INC.

PER V. Cooke
"Thank you"

IF THIS INVOICE IS NOT IN AGREEMENT WITH YOUR RECORDS, NOTIFICATION MUST BE MADE
IMMEDIATELY — AS NO ADJUSTMENT WILL BE ALLOWED AFTER 15 DAYS.

ORIGINAL INVOICE



Walter S. Kozdranski Co., inc.

TRUCKING · EXCAVATING · GRADING

OFFICE AND YARD

PHONE BU 3-8793 - CONNECTING ROAD - MAIN P. O. BOX 427 - NIAGARA FALLS, N. Y.

SOLD
TO

- Holy Trinity R. C. Church
1419 East Falls St.
Niagara Falls, N.Y.

TERMS net 10 days

DATE Aug 30, 1963

INVOICE NO.

A 3720

DATE	DESCRIPTION	ticket #	
	Holy Trinity Cemetery:		
July 29	TD14 Bulldozer 6 hrs @\$15.00 hr	7066	\$90.00
	Tractor trailer 1½ hrs @ \$15.00 hr	"	22.50
30	TD14 Bulldozer 8 hrs @\$15.00 hr	12419	120.00
Aug 2	19 tandem loads fill @ \$9.50 ld		142.50
	Approx. 75 tandem loads fill Aug 19th thru 30th		no charge
			<u>\$375.00</u>

RECEIVED PAYMENT
SEP 4 1963
WALTER S. KOZDRANSKI CO., INC.
PER J. Caah
"Thank You"

IF THIS INVOICE IS NOT IN AGREEMENT WITH YOUR RECORDS, NOTIFICATION MUST BE MADE
IMMEDIATELY — AS NO ADJUSTMENT WILL BE ALLOWED AFTER 15 DAYS.

ORIGINAL INVOICE

Walter S. Kozdranski Co., inc.

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PHONE BU 3-8793 - CONNECTING ROAD - MAIN P. O. BOX 427 - NIAGARA FALLS, N. Y.

SOLD TO
Holy Trinity Roman Catholic Church
1419 E. Falls St.
Niagara Falls, N.Y.

TERMS net 10 days

July 26, 1963

DATE

INVOICE NO.

A 3616

DATE DESCRIPTION

Work at Holy Trinity Cemetery
July 1st thru 17th, 1963

Jyly 1	71 tandem loads fill @ \$7.50 each		\$532.50
	D7 Bulldozer 8 hrs @ \$16.50 hr		132.00
	Tractor trailer 1½ hrs @ \$15.00 hr		22.50
2	29 tandem loads fill @ \$7.50 each		217.50
5-	17 " " " "		127.50
8	46 " " " "		345.00
	D7 Bulldozer 8 hrs @ \$16.50 hr		132.00
	Tractor trailer 1½ hrs @ \$15.00 hr		22.50
9	29 tandem loads fill @ \$7.50 ld		217.50
	D7 Bulldozer 5 hrs @ \$16.50 hr		82.50
10	28 tandem loads fill @ \$7.50 ld		210.00
15	73 tandem loads fill @ \$7.50 ea		547.50
	D7 Bulldozer 4 hrs @ \$16.50 hr	7264	66.00
	Tractor trailer 1 hr @ \$15.00 hr	"	15.00
16	68 tandem loads fill @ \$7.50 each		510.00
	D7 Bulldozer 8 hrs @ \$16.50 hr	10668	132.00
17	89 Tandem loads fill @ \$7.50 ea		667.50
	D7 Bulldozer 8 hrs @ \$16.50 hr	10669	132.00
			\$4,111.50

RECEIVED PAYMENT

JUL 31 1963

WALTER S. KOZDRANSKI CO., INC.

PER

V. Cooke
"Thank You"

IF THIS INVOICE IS NOT IN AGREEMENT WITH YOUR RECORDS, NOTIFICATION MUST BE MADE
IMMEDIATELY — AS NO ADJUSTMENT WILL BE ALLOWED AFTER 15 DAYS.

Walter S. Kozdranski Co., inc.

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OFFICE AND YARD

PHONE BU 3-8793 - CONNECTING ROAD - MAIN P. O. BOX 427 - NIAGARA FALLS, N. Y.

SOLD
TO

- Holy Trinity Roman Catholic Church
1419 E. Falls Street
Niagara Falls, N.Y.

TERMS net 10 days

DATE June 29, 1963

INVOICE NO.

A 3586

DATE	DESCRIPTION
	Fill & Equipment used at Holy Trinity Cemetery
	<u>Loads</u>
June 18	44
19	203
20	52
21	20
27	9
28	9
	337 tandem loads fill @ \$7.50 per load \$2,527.50
June 20	TD14 Bulldozer 4 hrs @ \$15.00 hr 60.00
	Tractor trailer 1 hr @ \$15.00 hr 15.00
21	TD14 Bulldozer 8 hrs @ \$15.00 hr 120.00
	<u>\$2,722.50</u>

RECEIVED PAYMENT

JUL 9 1963

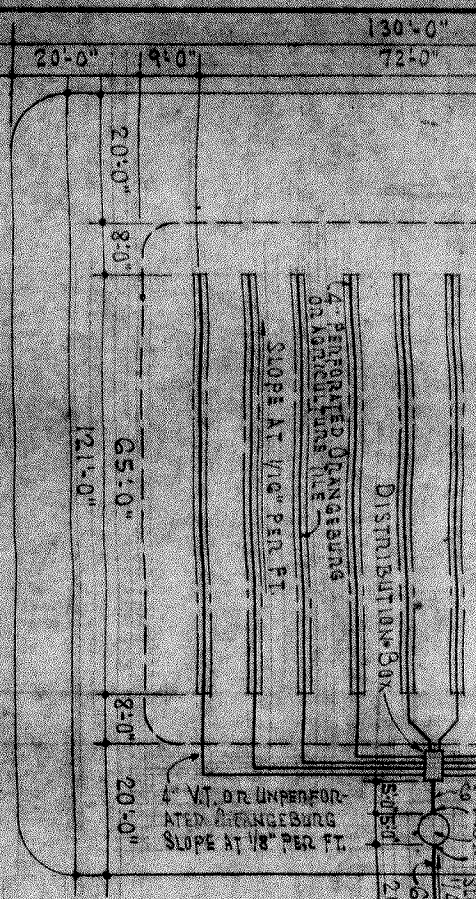
WALTER S. KOZDRANSKI CO., INC.

PER O. Cooke

"Thank You"

IF THIS INVOICE IS NOT IN AGREEMENT WITH YOUR RECORDS, NOTIFICATION MUST BE MADE
IMMEDIATELY — AS NO ADJUSTMENT WILL BE ALLOWED AFTER 15 DAYS.

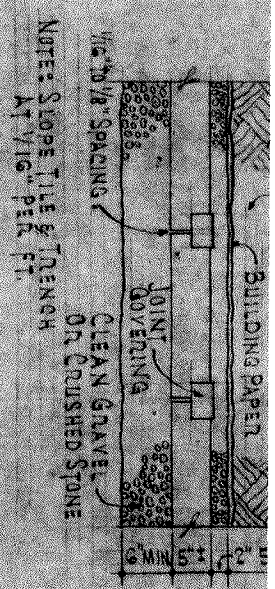
ORIGINAL INVOICE



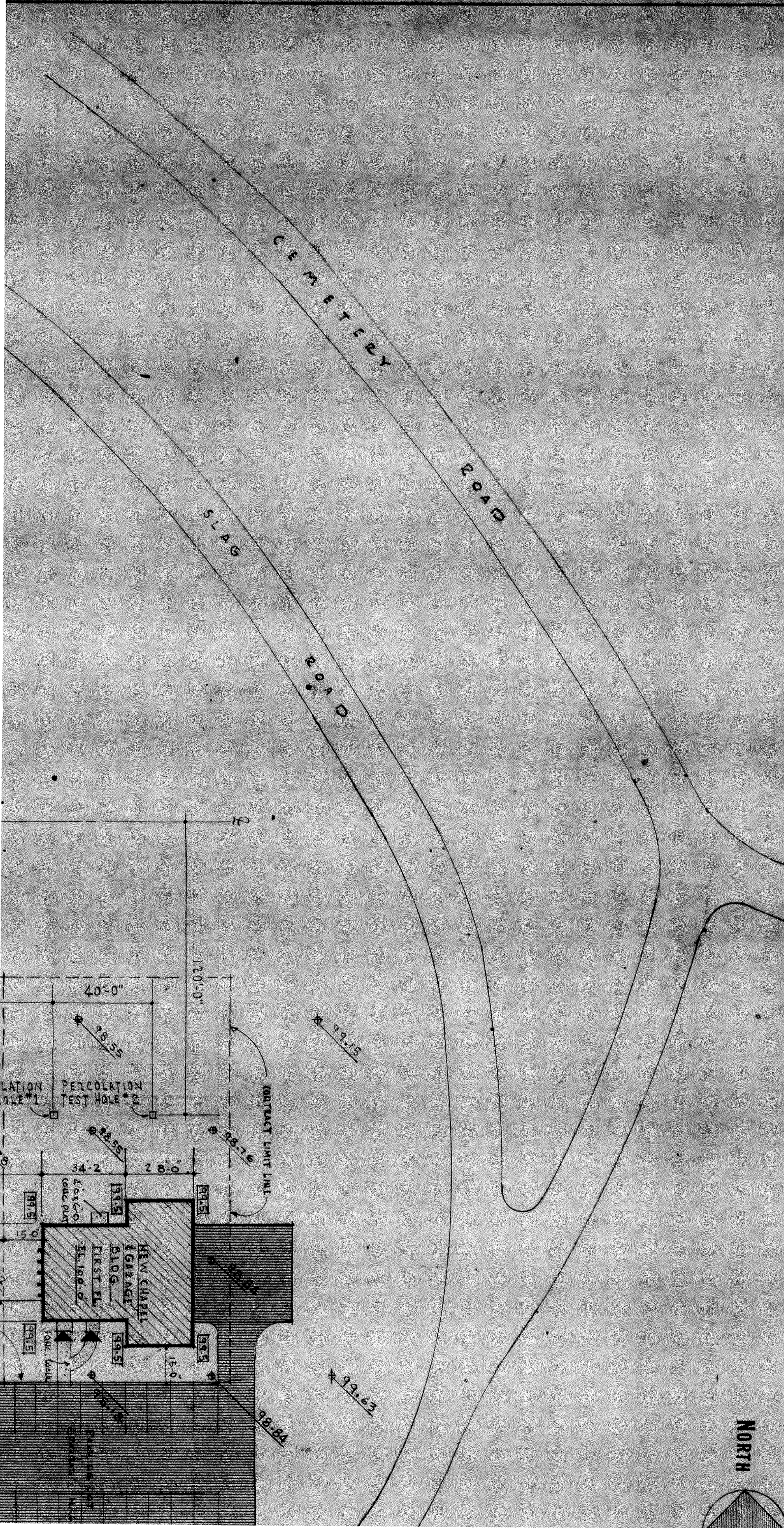
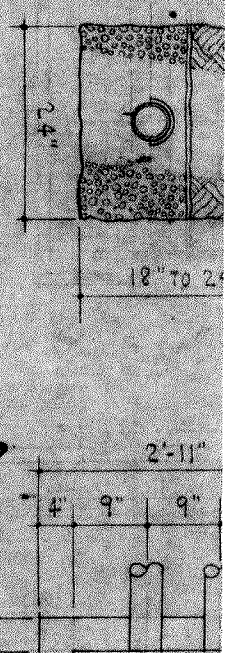
PLAN OF TILE FIELD
SCALE: 1"=30'-0"

SEWAGE DISPOSAL SYSTEM

LONGITUDINAL SECTION
TILE FIELD TRENCH DETAILS
NTS



CROSS SECTION




NORTH

DISIN
SCALE: 1/2"

RIVERDALE AVE

1773-1282

CONTRACTOR COPY
COLOR SELECTIONS

	
CEMETERY	BUILDING
HOLY TRINITY	R.C. CHURCH
TOWN OF LEWISTON	NEW YORK
779-6820 OFFICE OF CANNON • THIELE • BETZ • CANNON SHACKLETON • FITZGERALD ARCHITECTS - ENGINEERS NIAGARA FALLS, N. Y.	
CONTRACTORS MUST TAKE AND VERIFY ALL MEASUREMENTS AT BUILDING BEFORE MAKING SHOP DRAWINGS OR STARTING WORK	DRAWING 1
JOB NO. 1360 A	DATE JUN 15 1967
DRAWN BY N.G.	

WILL ALBAN CANNON, JR., R.A. #5605
CHARLES IRWIN THIELE, R.A. #5902
JOHN DONALD CANNON, P.E. #28573
EDWIN R. SHACKLETON, JR., R.A. #6687
ROBERT F. FITZGERALD, R.A. #6613

ROBERT STREET

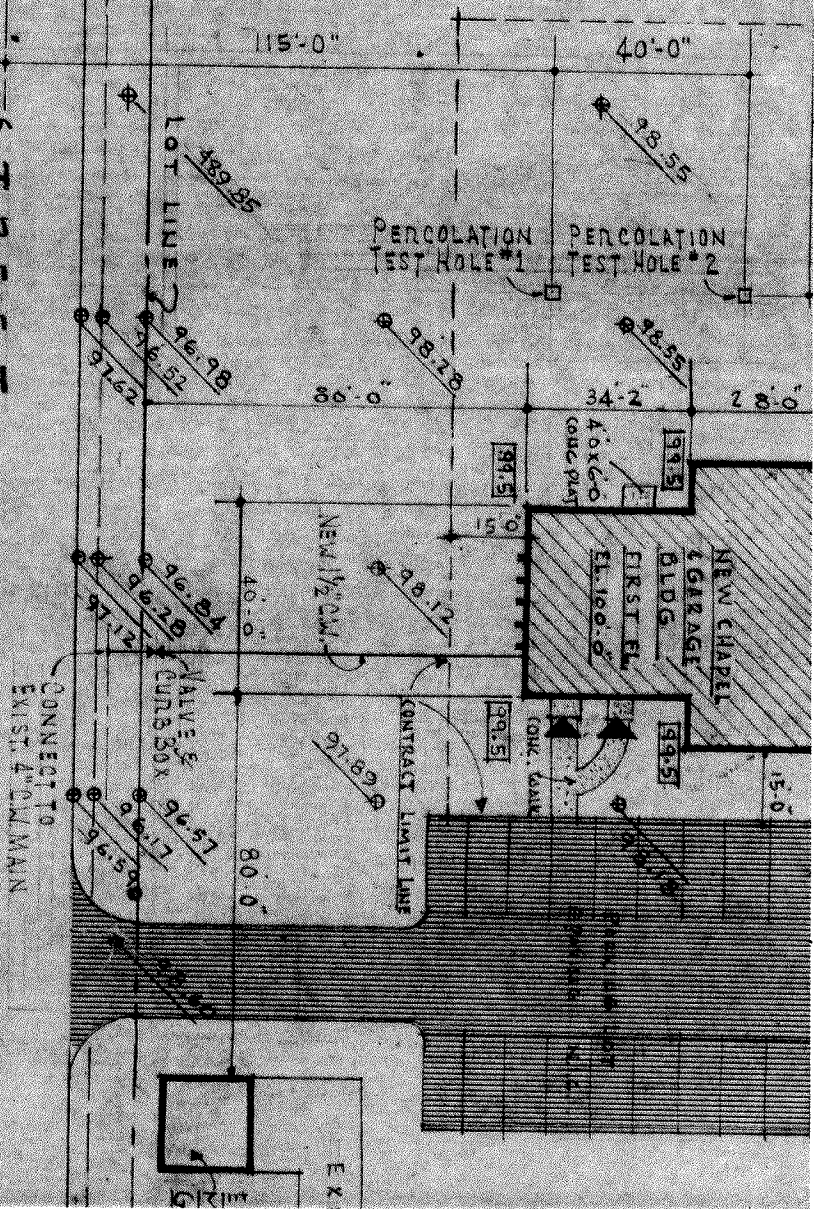
COLT AVE.

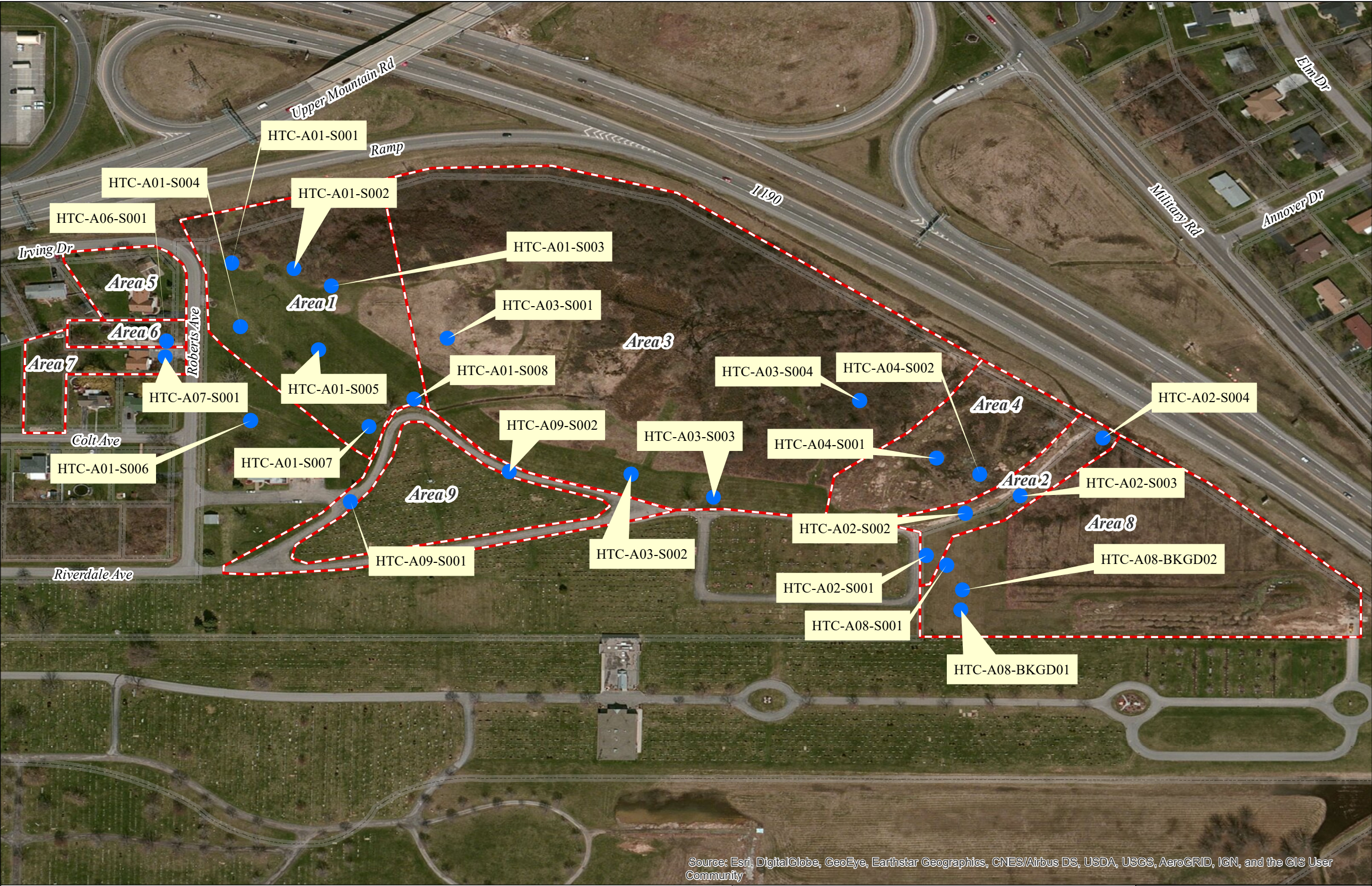
SITE PLAN

INFORMATION TAKEN FROM TOPOGRAPHICAL SURVEY
BY JAMES M. MCINTYRE N.Y.S. LIC # 27412
SURVEY DATED APRIL 28, 1964

SCALE 1" = 40' 0"

EXIST. GRADES INDICATED THUS
NEW GRADES INDICATED THUS

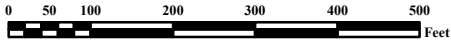




Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community

Legend

- Sample Locations
- ▭ Parcel Boundary
- ▭ Designated Area
- Sample Location



Weston Solutions, Inc.

In association with
Scientific and Environmental Associates, Inc.,
Avatar Environmental, LLC, Environmental Compliance Consultants,
On-Site Environmental, Inc., and Sovereign Consulting, Inc.

Figure 13B: Soil Sample Location Map (2017)

HOLY TRINITY CEMETERY
LEWISTON, NEW YORK

U.S. ENVIRONMENTAL PROTECTION AGENCY
REMOVAL SUPPORT TEAM 3
CONTRACT # EP-S2-14-01

DATE MODIFIED: 5/2/2017
GIS ANALYST: P. BUSTER

EPA OSC: E. DALY

RST SPM: B. NWOSU

FILENAME: 170427 Figure 4 Test Pit.mxd

It is Take notice of an.....

of which the within is a copy, duly grant-
ed in the within entitled action, on the

.....day of
.....19....., and duly

entered in the office of the Clerk of the
County of.....on the

.....day of.....19.....

Dated....., N.Y.,

.....19.....

BRENNAN & BRENNAN

Attorneys for

Office and Post Office Address
946-950 ELLICOTT SQUARE BUILDING
295 MAIN STREET
BUFFALO 3, NEW YORK

To.....

Attorney for.....

STATE OF NEW YORK

COURT OF CLAIMS.....

County of

HOLY TRINITY ROMAN
CATHOLIC CHURCH SOCIETY
OF NIAGARA FALLS, NEW
YORK, INC.

Claimant

against-

THE STATE OF NEW YORK
CLAIM NOS. 40890 and
43698

COPY

CLAIMANT'S PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

VIGOR E. HANE, ESQ.

WILLIAM R. BRENNAN, OF

~~BRENNAN & BRENNAN~~ COUNSEL

Attorneys for CLAIMANT

Office and Post Office Address
946-950 ELLICOTT SQUARE BUILDING
295 MAIN STREET
BUFFALO 3, NEW YORK

Due and personal service of the within

is admitted this.....day of.....19.....

Attorney for.....

(AFFIDAVIT OF SERVICE BY MAIL)

STATE OF NEW YORK

COUNTY OF

SS.

....., being duly sworn, deposes and says that he is
.....the attorney for the above named.....herein.
That on the.....day of.....19..... he served the within.....

upon.....
the attorney for the above named.....
by depositing a true copy of the same securely enclosed in a postpaid wrapper in the Post-Office—
a Branch Post-Office—a Post-Office Box regularly maintained by the United States Government at
.....in said County of.....
directed to said attorney for the.....at.....
N. Y., that being the address within the State designated by h for that purpose upon the
preceding papers in this action, or the place where he then kept an office between which
places there then was and now is a regular communication by mail.

Deponent is over the age of.....years.
Sworn to before me this
day of 19.....

Notary Public, Erie County, N. Y.
Commissioner of Deeds, Buffalo, N. Y.

STATE OF NEW YORK - COURT OF CLAIMS

HOLY TRINITY ROMAN CATHOLIC
CHURCH SOCIETY OF NIAGARA
FALLS, NEW YORK, INC.,

Claimant,

-against-

THE STATE OF NEW YORK

CLAIM NO. 40890

HOLY TRINITY ROMAN CATHOLIC
CHURCH SOCIETY OF NIAGARA
FALLS, NEW YORK, INC.,

Claimant,

-against-

THE STATE OF NEW YORK

CLAIM NO. 43698

BEFORE:

Honorable John H. Cooke,
Judge of the Court of Claims

APPEARANCES:

For the Claimant: Victor E. Manz, Esq., by
William R. Brennan, Esq.
of Counsel.

For the State: Honorable Louis J. Lefkowitz,
Attorney General, by
Morton H. Levy, Esq., Assistant
Attorney General.

CLAIMANT'S PROPOSED FINDINGS OF FACT

1. That Claim No. 40890 in the amount of \$793,655.00 was duly
filed in the Office of the Clerk of the Court of Claims on
August 6, 1962, and with the New York State Department of Law on
August 6, 1962.

2. That Claim No. 43698 in the claimed amount of \$10,000.00 was duly filed in the Office of the Clerk of the Court of Claims on April 15, 1964 and with the New York State Department of Law on the 15th day of April, 1964.

3. That said Claim No. 40890 in the sum of \$793,655.00 and said Claim No. 43698 in the sum of \$10,000.00 were consolidated into a single claim of \$803,655.00 by motion made in open court, and thereupon granted, there being no opposition thereto, on the 10th day of December, 1964. That said claim was neither assigned nor submitted, prior to this trial, to any other Court or Tribunal for audit or determination (m.240).

4. That the claimant herein, Holy Trinity Roman Catholic Church Society of Niagara Falls, New York, Inc. was duly incorporated as a New York State Religious Corporation by Certificate recorded on February 18, 1902 in Liber 5 of Corporations at Page 371 in the Niagara County Clerk's Office.

5. The aforesaid claimant acquired the property out of which the appropriations were made by the following deeds:

a) Deed dated March 5, 1910 from Michael Dyminski, grantor, to Holy Trinity Roman Catholic Church Society of Niagara Falls, New York, Inc., grantee, recorded on March 10, 1910 in Liber 347 of Deeds at Page 326 in the Niagara County Clerk's Office.

b) Deed dated October 11, 1939 from The Niagara Falls Power Company, grantor, to the Holy Trinity Roman Catholic Church Society of Niagara Falls, New York, Inc., grantee, recorded on October 27, 1939 in Liber 657 of Deeds at Page 151 in Niagara County Clerk's Office, and a correcting deed from the same grantor to the same grantee dated October 9th, 1944 recorded in

Liber 760 of Deeds at Page 445 on October 28th, 1944 in the Niagara County Clerk's Office.

c) Deed dated October 27th, 1944 from The Niagara/^{Falls}Power Company, grantor, to the Holy Trinity Roman Catholic Church Society of Niagara Falls, New York, Inc., grantee, recorded on October 28, 1944 in Liber 760 of Deeds at Page 453 in the Niagara County Clerk's Office.

d) Deed March 21, 1949 from Joseph N. Harbatowski, grantor, to the Holy Trinity Roman Catholic Church Society of Niagara Falls, New York, Inc., grantee, recorded on April 5, 1949 in Liber 947 of Deeds at Page 68 in the Niagara County Clerk's Office.

e) Deed dated August 12, 1952, from Charles A. Call, grantor, to the Holy Trinity Roman Catholic Church Society of Niagara Falls, New York, Inc. grantee, recorded on September 18, 1952 in Liber 1076 of Deeds at Page 386 in the Niagara County Clerk's Office.

6. That the pertinent dates connected with the filing and service of the appropriation maps were as follows:

a) Map 5, Parcel No. 195; Filed: In the Office of the Secretary of State on June 16, 1960; In the Niagara County Clerk's Office on August 8, 1960; with personal service being made on August 23, 1960 (m.83);

b) Map 173, Parcel No. 178; Filed: In the Office of the Secretary of State on June 16, 1960; In the Niagara County Clerk's Office on September 26, 1960; with personal service being made on September 29, 1960 (m.83);

c) Map 39, Parcel No. 226; Filed: In the Office of the Secretary of State on April 18, 1961; In the Niagara County Clerk's Office on August 28, 1962, with personal service being made on August 31, 1962 (m.83,84).

7. That the areas appropriated and the types of said appropriations were as follows:

- a) Map 5, Parcel No. 195 - 6.648 acres more or less; in Fee - without right of access to and from abutting property;
- b) Map 173, Parcel No. 178 - 18.407 acres, more or less; in fee - without right of access to and from abutting property;
- c) Map 39, Parcel 226 - 0.198 acre more or less; Permanent easement for a waterline.

8. That, prior to the State's appropriations, claimant's property was located at the junction of Upper Mountain Road and Military Road, in the Town of Lewiston, County of Niagara, State of New York, having a frontage of 1203.58 feet along Upper Mountain Road for its northwestern boundary and 1622 feet, more or less, of frontage along Military Road, for its northeastern boundary (m.16).

9. That prior to said appropriations the area of claimant's land including all interior roadway areas was 61.558 acres, more or less (Cl. Exh. 13 - m. 13).

10. That the area appropriated in fee by the State of New York was 25.055 acres, more or less; that the total area affected by State appropriations, including the permanent easement 0.198 acres more or less, was 25.253 acres, more or less.'

11. That area remaining to claimant, after deducting said three (3) appropriations, was, including all interior roadway areas, 36.305 acres (Cl. Exh. 13 - m.33).

12. That, prior to the State's taking, the southerly main road of the cemetery extended to Military Road (Cl. Exh. 14 - m. 20,21) which was marked by a gate (m.21), but which was blocked off by a State fence following the appropriation (m.21).

CLAIMANT'S WITNESSES

13. That surveyor McIntyre, during a field inspection in April 1964, found flood areas of water approximately three or four feet deep with a ditch full of water running in an easterly direction up to the State fence (m.24).

14. That surveyor McIntyre was of the opinion that claimant's residual property had two lines of water flow; one line of flow being from northeast to southwest; the other line of flow traveled in a northeasterly direction (Cl. Exh. 14, m.25,26).

15. That the center line of the southbound leg of the Niagara Expressway as constructed was generally higher in elevation than claimant's residual land to the southwest (M.26,27).

16. That surveyor McIntyre designated sections by "area filled" and "flooded land" (m.31), and showed that as much as over five feet of fill were added to land lying south of the appropriated parcel after the State's construction (M.31).

17. That surveyor McIntyre determined that the flooded area which existed after the State's appropriation, but prior to the time fill was added was approximately 500 feet wide on an east to west basis (M.32,33). The flooded area amounted to about 100,000 square feet or about 2-1/3 acres (m.33).

18. That surveyor McIntyre first inspected the property in

April, 1963 and used an assumed datum of 500 feet. (m.41).

19. That, per surveyor McIntyre, the cemetery land was generally higher than the Expressway ditches constructed by the State of New York with the exception of "possibly one or two areas" (m.42).

20. That surveyor McIntyre characterized the accumulation of water on claimant's property lying south of the Expressway as a "lake" - three or four feet deep. (m.49).

21. That, as a result of surveyor McIntyre's study, findings, and testimony, it was evident that at least one natural flow and drainage line on the claimant's property lying south of the Expressway, to wit: - the flow toward the northeast was cut off by the Expressway as constructed.

22. That claimant called as a witness Henry C. Jenkins, a New York State licensed professional engineer, who was employed by the City of Niagara Falls, Department of Public Works, Bureau of Engineering, and had acted as Village Engineer in Youngstown, New York (m.55), and was experienced in design work of drainage systems, and storm sewer systems. (m.54); that most of witness Jenkin's experience had been in estimating construction costs (m.54), including drainage and storm sewer systems (m.55); that witness Jenkins also had a degree in Chemical Engineering (m.55), and had studied aeronautical engineering at Yale University and had worked in electronic engineering at Bell Aircraft (m.55).

23. That the ditch and sewer drainage system which was designed by engineer Jenkins was "a minimum of design" (m.56), and his estimate assumed that the Town of Lewiston would allow

emptying of the storm water into the Roberts Street ditch and that the State would allow the emptying of storm water into the culvert system to the north (m.56,57).

24. That the Town of Lewiston had relatively poor drainage ditches which would have to be cleaned out and made deeper (m.57) and this factor was not included in the cost of the system designed for Holy Trinity Cemetery (m.57).

25. That the total cost of the ditches and the sewers, as designed, was estimated by Mr. Jenkins to be \$27,100.00 (m.62).

26. That the aforesaid sewer and ditch cost would be approximately 10% less for year 1960 (m.64) which would reduce the estimated total cost to \$24,400.00 (m.64).

27. That the foregoing cost figures for remedial ditches and sewers did not include the cost of fill (m.68).

28. That Roy C. Copeland, a witness called by the claimant, who had served as Zoning Officer, Building Inspector, and Assessor of the Town of Lewiston (m.70) testified that as of June 30, 1960, prior to the State's appropriation, the Holy Trinity Cemetery property was zoned as cemetery land (m.72, 73), and the residue of said Holy Trinity land, after the State's appropriation, was also zoned as cemetery land (m.75,76).

29. That in the zoning ordinances of the Town of Lewiston, effective prior to August 1960, it was provided that land to be used for cemetery purposes required a prior approval of the zoning Board of Appeals (m.77).

30. That since 1957 said Board of Appeals has issued no approval or permits for cemeteries (m.77), and witness Copeland stated that he had participated in the deliberations

of the Zoning Councils (m.78).

31. That in the revised zoning ordinances of March 2, 1963, the provision pertaining to issuance of cemetery permits has been stricken and there was no ordinance after such revision which gave a ny method with regard to the application for cemetery use permits (m.81).
32. That the claimant appeared by and through Reverend John Prackajlo who was Pastor, Treasurer and Rector of the claimant (m.84), positions which he had last held since October, 1957 (m.85).
33. That the claimant herein as a religious corporation conducted its affairs in accordance with the Roman Catholic rite (m.85), and had operated Holy Trinity Cemetery since 1910 (m.85).
34. That Father Prackajlo was the Administrator of the cemetery (m.86) at the time of the appropriation and had served as Administrator since 1957 but also had prior experience with the same cemetery from 1933 to 1936 inclusive and also during 1941-1942 (m.86).
35. That the Holy Trinity Church congregation consisted of 975 families (m.86) with an aggregate of about 2800 individuals (m. 87); that the church and parish were and are located at the corner of 15th Street and East Falls Street in the City of Niagara Falls, and this location was not adjacent to or close by the cemetery.
36. That Father Prackajlo as Treasurer of the corporation of the claimant had custody and control of the books of the claimant (m.87).

37. That the sales and use of graves in Holy Trinity Cemetery were as follows:

<u>Year</u>	<u>Interment-Adult</u>	<u>Interment-Infant</u>	<u>Reserve (graves sold but not used immediately)</u>
1951	59	4	40
1952	42	4	32
1953	48	6	36
1954	55	10	46
1955	69	2	53
1956	69	4	51
1957	53	3	35
1958	75	1	60
1959	57	1	60
1960	<u>63</u> 590	<u>10</u> 45	<u>72</u> 485

(m.87,88)

38. That infant graves during said period were sold for \$20.00 per grave (m.89); That adult graves were sold in 1951 and 1952 for \$40.00 per grave and after 1952 were raised to \$60.00 per grave (m.89); That in 1955 adult graves were sold for \$60.00 per grave and \$80.00 per grave until 1960 when the adult graves were sold at \$75.00 per grave in one section and \$90.00 per grave in another section (m.89).

39. That the cemetery charged \$60.00 per interment, which price was constant from 1957 for adults and \$8.00 for an infant (not a child) which charge was allocated as follows: \$25.00 unpaid to the gravedigger or caretaker who opened the grave and \$35.00 was put aside for permanent care (m.91,91).

40. That, exclusive of the \$25.00 gravedigger charge, the gross or combined sale price in 1960 for a \$75.00 grave, when an interment was made, was \$135.00 and the gross or combined

grave sale price for a \$90.00 grave, under the same circumstances, was \$150.00 (m.91).

41. That the income and expenses of the cemetery were as follows:

<u>Year</u>	<u>Income</u>	<u>Expenses</u>	<u>Net</u>
1951	\$28,814.00	\$ 3,454.71	\$ 359.29 (m.92)
1952	9,336.25	6,738.02	2,598.23 (m.96,97)
1953	6,631.92	7,080.82	448.90-Deficit (m.98)
1954	11,814.54	4,902.15	6,912.39 (m.99)
1955	16,632.89	9,990.90	6,641.99 (m.99)
1956	11,197.85	7,921.45	4,276.40
1957	8,005.00	13,070.82	5,065.82-Deficit (m.100)
1958	13,465.34	5,591.74	7,873.65 (m.101)
1959	12,242.85	6,214.03	6,028.82 (m.102)
1960	20,058.64	4,074.42	15,984.22 (m.102)

42. That it was the practice of the cemetery to lump maintenance capital improvements, and all items of expense under current expenses (m.97); that this included installing of markers and stakes and surveying for rows of graves (m. 92); It included new rows of graves and a new cross (m.97); it included the building of a road and the repairing of it (m.100);

43. That "improvements" (capital items) were included in expenses in the following amounts for the following years:
1951 - \$496.00 (m. 92); 1952 - \$4,056.81 (m.97); 1953 - \$4,373.28 (m.98); 1954 - \$3,938.80 (m.99); 1955 - \$6,562.90 (m.99); 1956-\$3,961.45 (m.100); 1957 - \$10,031.50 which included building of road (\$6,365.00), and grading for new development including staking (\$1,218.60), \$400.00 for a gate, \$48.00 for signs and a payment of \$2,000.00 on a cross. (m.100,101); 1958 - \$3,218.86 (m.101); 1959 - \$625.00 plus machines of \$2,251.23 (m.102); 1960 - None.
44. That the dollar amounts testified to by Father Praczkaio were also the amounts deposited in the cemetery bank accounts from 1951 to 1960 (m.107).
45. That there were no other funds commingled or intermingled in the cemetery bank accounts (m.107,108).
46. That there was on deposit as of September 30, 1960, in the Niagara Savings Bank in an account marked "Holy Trinity R.C. Church Cemetery" the amount of \$20,120.45 (m.108,109 - Exhibit 20, in evidence (m. 241).
47. That there was another bank account entitled "Holy Trinity R. C. Cemetery" in the same bank with a balance as of September 1, 1960 of \$11,790.68 (m. 110 - Exhibit 21 - in evidence m. 241).
48. That in April of 1961, money was withdrawn by the claimant from the aforesaid two cemetery accounts to the extent of \$25,000 total and deposited with the Roman Catholic Diocese of Buffalo in a cemetery fund upon which 4% interest is paid (m.110).

49. That the \$25,000.00 on deposit with the Diocese of Buffalo was considered by the claimant to be a permanent maintenance fund (m.110,111).

50. That as of December 10, 1964, there was on deposit in the cemetery savings account (Claimant's Exhibit 21 - in evidence m.241) the sum of \$31,428.88 in addition to the \$25,000.00 permanent maintenance fund (m.111). That, in addition to the aforesaid aggregate deposits in excess of \$56,000.00, the claimant maintained a cemetery checking account in the Niagara Falls Office of the Manufacturers and Traders Trust Company, with a normal balance of approximately \$6,000.00 (m.112).

51. That prior to 1957, the claimant had approximately \$5,470.32 in a cemetery savings account plus a balance in a cemetery checking account which Father Prackajlo could not remember as to its exact balance (m. 113).

52. That, in the period between the return of Father Prackajlo in 1957 to the management of Holy Trinity Cemetery and 1960 when the State's appropriation maps were filed, the following permanent improvements in the cemetery were constructed:

- (a) a road (m.113);
- (b) an apron on Military Road (m.114);
- (c) a new cross (erected prior to 1957 but paid for during or after 1957 (m.114);
- (d) a gate and two towers at Military Road (m. 115).

53. That all of the invoices and bills for the improvements heretofore mentioned had been paid by the cemetery (m.117);

54. That prior to the State's appropriation, a funeral procession was offered, by way of entrance and exit, an option to come in from Military Road and return by the same route or return by Riverdale Avenue on to Lewiston Road, or, in the alternative, it could enter from Lewiston Road on to Riverdale Avenue and leave at its option either by Military Road or leave by Riverdale Avenue onto Lewiston Road (m.116).

55. That prior to the State's appropriation, the adjacent cemetery lands were at the same land level with these roads (m. 118).

56. That, prior to the State's construction of the Expressway, there was in the early Spring or late Fall or after a heavy snow or rains a marsh area which was about fifteen feet or eighteen feet by twenty-two feet or twenty-three feet in area (m.120,121).

57. That, at such time prior to said Expressway construction, where said marsh area would occur, the depth of the water was five or six inches (m. 121), and, at its deepest condition during pre-Expressway times, this marsh measured about ten inches deep (m.121,122).

58. That, after the State's construction and prior to the building of an elevated road by the Cemetery south of the newly constructed Expressway, water collected to the extent of being four or five feet deep (m.122).

59. That, prior to the construction of the Expressway, Father Prackajlo was able to walk across the cemetery fields to shut off various valves used in the cemetery but after the

construction of the Expressway, he could not walk across the same territory due to its flooded condition (m.123,124).

60. That the money paid by the Claimant for earth fill to fill in the marshy area was \$16,222.00 (m.125), later amended to \$16,447.50 (m.137), but the claimant also received 118 loads of fill without cost (m.139).

61. That, in addition to the placing of fill in the flooded areas after the Expressway construction was commenced, a new and elevated road was constructed south of the Expressway (m.126, 127).

62. There were no administration costs in the running of the cemetery (m.128).

63. That the \$25.00 per grave paid the gravedigger exactly covered the charge for his services (m.128); that the cemetery had been accustomed to taking up a Memorial Day collection which amounted to \$125.00 to \$135.00 (m.129); and that the Holy Trinity parishioners would, at other times, give donations of \$2.00, \$3.00, \$5.00 or \$10.00, for the upkeep of the cemetery (m.130), and this donated money went into the general fund of the cemetery.

64. That any practicing Roman Catholic could have been buried in the claimant's cemetery (m.130,131), and it was not required that a person be a member of the Holy Trinity Church^Parish (m.131).

65. That the ratio of parishioners to non-parishioners who are interred in the cemetery approximated a 50%-50% ratio (m. 131,132).

66. That in 1960, prior to the State's taking, there were

two Roman Catholic cemeteries in the Town of Lewiston, one being Gate of Heaven and the other the claimant's cemetery (m.132); that Gate of Heaven was a diocesan cemetery (m.132); That in the Metropolitan Niagara Falls area there was only one other Roman Catholic cemetery, being Saint Joseph's on Pine Avenue belonging to Saint Joseph's Church (m. 132).

67. That there were no Roman Catholic cemeteries in the Town of Niagara (m.132), and there was one Roman Catholic cemetery in Lockport, and there were no Roman Catholic cemeteries between The Town of Lewiston, the City of Niagara Falls and Lockport (m. 135).

68. That prior to the State's appropriation, the drainage ditches along Upper Mountain Road and Military Road would drain as follows: the Military Road ditch would drain south-east and the Upper Mountain Road drainage ditch would drain northeast (m.136).

69. That in the sale of lots in claimant's cemetery there were no promotional sales, or brokerage expenses (m.147).

70. That with regard to the money on deposit for a permanent care fund (\$25,000.00) with the Diocese of Buffalo, there was a demand note evidencing same delivered by said Diocese to the claimant.(m.147).

71. That a re-audit by Father Praczakajlo of the records for graves sold in 1960 show that 150 graves were sold instead of 145 (m.151).

72. That the claimant cemetery corporation made annual financial and business reports, signed by the Trustees to the Chancery of the Diocese of Buffalo (m.164).

73. That during his current administration beginning in 1957,

Father Prackajlo, as Treasurer of the claimant corporation, kept the books personally (m. 166).

74. That the gross cemetery income for 1961 was \$16,691.41, with expenses of \$5,978.81, making a net of \$10,712.60 (m.173). For 1962, the gross cemetery income was \$21,961.87 (m. 174), with expenses of \$10,513.15, of which \$5,000.00 was spent for a new road (m. 175), making a net of \$11,448.72.

75. That prior to the State construction of the Expressway "a small accumulation of water" drained into the ditch on Roberts Road (m.184), but during construction of the Expressway the State bulldozed the side of the Roberts Road' ditch (m.184), and constructed a temporary road (m.185), all of which were changes in pre-existing conditions.

76. That prior to the State's appropriation there was a drainage culvert and ditch in the northern apex of the cemetery property opposite the Johnson property which did not carry "much drainage", per Father Prackajlo (m187-188). That said drainage caused some reeds and "tall grass" to grow. (m.189).

77. That for the years 1957 to 1960 inclusive it was testified that the income from the sale of graves alone without any inclusion of the money collected for the cost of perpetual maintenance or money donated for operation of the cemetery, was \$34,341.00 (m.228) and that expenses connected with the maintenance of the cemetery for, the same period were \$26,951.01. (m.229); that an analysis of these income and expenses for 1957-1960 inclusive show the following:

- a) That the expense amounts include all of the capital items purchased including such items as gates, signs, machines, roads and the like excluding only \$2,000.00 paid for a new cross which is demonstrated by adding the total expense figures given for 1957 to 1961 inclusive in the sum of \$28,951.01, then subtracting \$2,000.00 for the cross payment making a resultant amount of \$26,951.01.
- b) That the year 1957 was a year of large and exceptional capital construction and was not an average or representative year for expenses.
- c) That, in computing income, Father Prackajlo, upon a request from the State's counsel, to so compute, restricted the income aggregate of \$34,301.00 to the sale of graves only. (m.228).
- d) That such procedure of calculation eliminates money collected for the expense of "grave openings" which, when paid out, were listed in the expense figures given for the year's involved.
- e) That the actual gross cemetery income for the years of 1957-1960 inclusive was \$53,771.83. (\$8,005.00; \$13,465.34; \$12,242.85; \$20,058.64; - m. 100,101,102), of which, only \$5,160.67 was due to donations and "miscellaneous income."
- f) That it should be observed that 1957 was the year of Father Prackajlo's arrival as cemetery administrator and he did much capital improvement work which was non-recurring in nature.

78. That a Roman Catholic could be buried in any consecrated grounds (m.230).

79. That the State's appropriation cut-off the cemetery's water line (m.238).

80. That Percival V. Bowen, claimant's appraisal witness, has been a licensed real estate broker since 1912 (m.242), and had been an appraiser from about 1915 - 1918 (m.243); at the time of his appraisal he was a member of American Institute of Real Estate Appraisers, New York State Society of Appraisers, an associate member of the American Society of Appraisers and was a corresponding appraiser for various banks and insurance companies and had testified in behalf of the State of New York, the United States Government, the County of Erie, Town of Amherst, and the Town of Tonawanda, in various courts in condemnation and appropriation cases (m. 243,244).

81. That claimant's witness Bowen, both prior to 1960 and also subsequent thereto, had appraised various properties and appeared as a witness in litigation involving properties in the Town of Lewiston and the surrounding area (m.250), and had appraised Riverdale, Gate of Heaven, and St. Michael the Archangel, cemeteries, which were close to claimant's cemetery (m.250,251).

82. That witness Bowen had investigated sales of land and zoning ordinances, their application and their effect in preparation for this testimony (m.251,252).

83. That the "higher-grade" residential areas in the Town of Lewiston existed in and along Lewiston Road and extended to the Village of Lewiston (m.253,254).

84. The City of Niagara Falls lying to the south of the Town

of Lewiston, had a reported population of 90,872 in 1950 and in accordance with a special census of the City of Niagara Falls in 1957 there was a population therein of 101,000 (m.254); that the Town of Lewiston was growing at a faster rate than the City of Niagara Falls (m.255).

85. That about the time of the appropriation in 1960, there was a traffic count of 4500 cars a day on Upper Mountain Road and 4800 cars a day on Military Road although Military Road had an earlier count of 5600 cars per day, the reduction being caused by construction activity in and around Military Road (m.256).

86. That the percentage of grave occupancy in 1960 of adjacent Gate of Heaven Cemetery was about sixty percent (60%) (m.258).

87. That Mr. Bowen first actually inspected the cemetery in the early part of 1964 or in December, 1963 (m.260).

88. That Mr. Bowen classified Lewiston Road as a major highway, Riverdale Avenue as a secondary road, Upper Mountain Road as a major highway and Military Road as a major highway and that the major frontages of The Holy Cemetery property were Military Road and Upper Mountain Road (m.261,262).

89. That the highest and best use of the property was for use as a cemetery (m. 264).

90. That prior to the State's appropriation, there was an awareness on the part of the public that it had power in opposing the rezoning of lands for uses which it considered undesirable, such as a cemetery; for that reason, land which

was developed for cemetery purposes and was available for cemetery purposes acquired a value which was above the value of surrounding lands that did not have this zoning possibility or existing use; that there was an increasing demand for cemetery lots and cemetery development and at the same time there was an increasing difficulty in the obtaining of lands for cemetery purposes (m.264,265).

91. That cemetery organizations would purchase blocks of lots from existing cemeteries rather than attempt to go out into the open market and buy land and face the difficulty of a rezoning (m.265).

92. That cemetery land, as cemetery land, had and has a real estate market of its own, which may be ascertained from sales and leases (m.265).

93. That the following sales and leases of land in use for cemetery purposes could be used as a measure of Value with regard to claimant's cemetery:

(a) Polish National Catholic Cathedral of the Holy Mother of the Rosary grantor, to New York Central Railroad, grantee, October 18, 1956, recorded in Liber 6081 of Deeds at page 468 in the Erie County Clerk's Office, area sold .351 acre; at a rate of \$128,000 per acre (m.268).

(b) Saint Adelbert's Roman Catholic Church Society, grantor, to New York Central Railroad, grantee, dated December 4, 1956 and recorded in Liber 6100 of Deeds at page 414; area sold 1.123 acres; at a rate of \$40,000.00 per acre (m.269,270).

(c) Town of Amherst, grantor, to Saint Benedict's Roman Catholic Church Society, grantee, by deed dated April 7, 1953 and recorded in Liber 5301 of Deeds at Page 19;

area sold .87 acres, at a rate of \$28,730.00 per acre.

(d) Lease from Riverdale Cemetery, lessor, to the New York State Power Authority, lessee, dated May 1, 1958; area leased 11,250 square feet; annual rent \$1,125.00; capitalized value per acre \$54,450.00 (m. 271,272).

(e) Lease from Holy Trinity Roman Catholic Society, lessor, to the New York Power Authority, lessee, area 16,658 square feet; at an annual rent of \$1,000.00 capitalized value per acre (\$32,700.00 (m.272)).

(f) Sale by Riverdale Cemetery, grantor to Russian Orthodox Greek Catholic Church, grantee, on May 25, 1960; a 233 grave area; for \$16,310 or a rate of \$50,000.00 per acre (m.278,279).

94. That as a result of the aforesaid sales and leases, his investigation and evaluation of property records, his testimony in prior cemetery cases, his knowledge of zoning conditions that existed in the Town of Lewiston at and prior to the State's appropriations and his general knowledge of the real estate market in that area, appraiser Bowen was of the opinion that the land taken by the State of New York was worth \$20,000.00 per acre (m.273), or total dollar value of \$500,000.00 in a rounded sum (m.273), plus the value of \$3,960.00 for the permanent easement Parcel of .198 acres making total direct damages of \$503,960.00 (m.274).

95. That with regard to severance and consequential damages appraiser Bowen testified as follows:

(a) The remaining land had been worth \$580,000 to which he applied a five percent (5%) loss of value due to the elimination of access to the cemetery entrance on Military

Road and inability to have direct entrance to Upper Mountain Road and Military Road, comprising a damage item of \$29,000.00 (m.275).

(b) That the cost of fill and a remedial drainage system would be \$41,222.50 (m.277), all necessitated by the State's appropriations.

(c) That, as a result of the State's appropriations, witness Bowen's estimate of total severance and consequential damages was \$70,222.50.

96. That the property appropriated, if one were to consider it from a non-cemetery use or secondary value, had, in any event, a market value of \$10,000.00 per acre (m.281).

97. That in computing his acreage value of \$20,000.00 per acre for land used for cemetery purposes, appraiser Bowen made allowances for differences of location and circumstances and the inconvenience and expense of moving of interred bodies in reaching the value of \$20,000.00 per acre (m.292, 293, 294, 295, 296).

98. That, on October 10, 1958, pursuant to a deed from Walter Johnson, grantor, to the Power Authority of the State of New York, grantee, recorded in Liber 2199 of Deeds at Page 379, in the Niagara County Clerk's Office covering 2.294 acres of vacant land at the northeast corner of Upper Mountain Road and Military Road, a consideration of \$43,000.00 per acre was paid (281, 282).

99. That the Office of the Secretary of State of New York at Albany has no record of a sale from one cemetery organization to another cemetery organization of cemetery land (m.289, 290).

100. That Mr. Bowen himself had attempted to buy cemeteries but had failed to produce a willing seller, that he had financed

one cemetery and he had appraised several cemeteries (m.296).

101. That appraiser Bowen did not use as his main valuation approach, a cemetery acreage formula which envisioned active and commercial sales and exploitation because he did not think it applied where a cemetery was not being pressed for sale to its full potential and where no development was being promoted (m.304).

102. That, upon request by the State, witness Bowen, using the so-called Mount Hope case formula and applying a 3% Inwood Premise factor, determined the value of approximately one-third ($33\frac{1}{3}\%$) of the property taken to be \$175,000.00 (m.304,305,313).

103. That the value of \$175,000.00 under the Mount Hope case formula was for an area of eight acres (m.313); that by mathematical computation the value, under the same formula for 25 plus acres appropriated by the State of New York from the claimant herein, would be \$525,000.00 (m.313).

104. That witness Bowen determined that an application of the Mount Hope formula to the subject matter would unfairly penalize the claimant because it did not give weight to the values of two-thirds of the appropriated lands (m.316).

105. That by showing there was an alternative value of the appropriated parcel for general purposes in any event, it insured against and/or reduced any factor of risk, management expense, and waiting for the future development of the cemetery.

STATE'S WITNESSES

106. That Duane Heineman, a State employee for six and one-half years, with rank of an Assistant Civil Engineer (also being a Licensed Professional Engineer; m. 324), testified that State Exhibit J marked in evidence as State Exhibit J-1 which purported to be a topographic map made from aerial photographs of the area "around Niagara Falls and Lewiston m. 325" was spot checked at only point which was located near the junction of Roberts Road and Upper Mountain Road and not in the Holy Trinity Roman Catholic Cemetery tract.

107. That witness Heineman testified that contour lines from aerial photographs sometimes do not check out in the field (m.338) and that where there is a discrepancy between an aerial photograph and a ground figure, the ground figure is accepted as the more reliable (m.339).

108. That witness Heineman stated, from examining Exhibit J-1 (prepared in 1958), that some of the water on the Holy Trinity Cemetery property would flow from southeast to northwest (m.347).

109. That although witness Heineman admitted that a topographical map is usually made showing the grades of a Thruway or Expressway (m.348), he had no knowledge of whether or not there were such maps in the Holy Trinity case (m.348).

110. That State's witness Giardina, a construction supervisor from early 1962 in the area affecting claimant's cemetery (m.350) testified that the State of New York offered to the claimant 30,000 cubic yards of fill for use in the low spots which

existed after the building of the Expressway (m.358).

111. That the Expressway was elevated and built at a grade higher than the original natural ground level (m.359).

112. That State's witness Giardina testified that, prior to the State's construction, the water on claimant's property flowed generally "north and southwesterly" according to the State's plan (m.360) but "in actuality" it flowed west and then south (m.360).

113. That witness Giardina testified that it was an accepted engineering principle that land which formerly could absorb water, could no longer absorb water due to a highway or other factor compressing the land (m.361).

114. That witness Giardina stated that the State's ditches overflowed "occasionally" and "we have a great maintenance problem" (m.362).

115. That State records indicated that, prior to the State's appropriation there was a man-made ditch out of the eastern portion of the Holy Trinity Cemetery, drained in a northerly direction and it was intercepted by a ditch from the Johnson property and then ran southerly across Roberts Road (m.360).

116. That State's witness Giardina stated that the drainage went into the culvert at the foot of Roberts Street (m.375) which tied into a town drainage system (m.365) in or along Upper Mountain Road, which drainage was removed by the project (m.375).

117. That State's witness A. Russell Tryon, a licensed landscape architect, accepted the State's map Exhibit J-1 as a valid map

without knowing anything about where the ground control stations were located and would not even make an assumption as the whereabouts of these stations (m.395-396).

118. That witness Tryon testified that he made no effort to inspect the profiles of grades which the State prepares prior to the erection of an Expressway (m.394-400).

119. That witness Tryon was not familiar with the cemetery prior to the State's appropriation (m.405); that the water on claimant's land flowed "naturally" to the west (m.408) and that some of the water which formerly flowed to the west would be cut off by the Expressway (m.409), and that "conceivably" some of the water prior to the State's appropriation flowed in the Upper Mountain Road ditch toward the intersection of Upper Mountain Road and Military Road. (m.411).

120. That witness Tryon testified that to truck in fill from Hyde Park would cost at least \$1.00 to \$1.50 a cubic yard delivered at the site (m.414) and that fill that had rocks, stones, and boulders in it was not suitable for a cemetery use (m.415).

121. That the State's valuation witness Nathan A. Mirza was a real estate appraiser employed upon salary by the American Appraisal Company (m.376-377); that he was a graduate of Indiana University with a major in real estate administration (m.377), and while employed by American Appraisal Company had received a ten week training program in general real estate appraisals plus one week in condemnation appraisals (m.377); that his total employment by American Appraisal Company was 5 1/2 years (m.378).

122. That he inspected the Holy Trinity Cemetery on August 2, 5, 6, 7, 8, 1963, and on October 9 and 14, 1963. (m.380).

124. That witness Mirza found Holy Trinity to have the following measurements prior to the State's appropriation: 2150 feet of frontage on Military Road; approximately 1130 feet of frontage on Upper Mountain Road; and approximately 945 feet frontage on Roberts Street; approximately 1150 feet of frontage on Riverdale Avenue and he found the gross area of the cemetery to be 62.301 acres (m.417).

125. That he found the claimant's cemetery to be developed from west to east in a line parallel to Riverdale Avenue (418).

126. That witness Mirza defined the highest and best use of real property as "that use of land which would produce the greatest net return to land over a reasonable period of time" (m.418).

127. That in his opinion "the highest and best use of the land owned by Holy Trinity Cemetery was for cemetery purposes" (m.418-9).

128. That witness Mirza's three reasons for his conclusion as to highest and best use were as follows:

A). This use was evidenced by the zoning ordinances (m.419);

B). As evidenced by the existing development of the land (m.419);

C). Was evidenced by the development of two existing cemeteries lying south of Holy Trinity Cemetery (419).'

129. That, per witness Mirza, the total income from the sale of graves for a ten year period was \$70,690 for a single year

average of \$7,069.00.(m.421), and computed the weighted average for a 1960 retail price of graves to be \$80.75 per grave (m.422), using 40 square feet per grave (m.423).

130. That witness Mirza testified that 34,848 square feet was the net saleable area per acre thereby rendering a total of 871 graves as saleable per acre (m.422-423).

131. That witness Mirza estimated development costs for the claimant's cemetery at \$.25 per square foot or \$10,890 per acre (m.424) and he stated that with regard to sales, Holy Trinity Cemetery had no administration building or sales staff and had a "low overhead operation" (m.424).

132. That witness Mirza estimated selling costs at five (5%) per centum of a selling price of \$80.75 per grave (m.425), or selling cost per acre of \$3516.66 (m.427).

133. That he estimated the maintenance costs at a rate of 25% of the gross income of \$70,333.25 gross income per acre (871 graves x \$80.75 per grave) making a cemetery maintenance cost per acre of \$17,583.31 (m.427).

134. That Mirza's total expense deductions per cemetery acre were \$31,989.97 (m.427).

135. That witness Mirza estimated the net per cemetery acre at \$38,343.28, or a net income per grave of \$44.02 (m.428).

136. That witness Mirza testified that he used the following land figures: 9.400 acres developed as of 1960, of which 7.4 acres had been sold leaving 2 acres of developed but unsold land which 2 acres would comprise 1,742 graves unsold in the developed sections (m.428).

137. That witness Mirza used 62.301 acres of gross land area which after deducting 9.40 acres of developed land (containing both sold and unsold graves) left an undeveloped reserve land of

52.901 acres (m.428-429).

138. That he computed the unsold acreage (developed and undeveloped) at 54.901 acres (m.429) which he obtained by adding the undeveloped reserve land of 52.901 acres to the two acres of developed but unsold land (m.429).

139. That witness Mirza by taking the 54.901 acres of unsold land and multiplying this figure by 871 graves per acre reached an estimate of a total grave inventory unsold of 47,819 graves (m.429).

140. That witness Mirza figured the rate of sale of graves as follows: 1951 to 1955 inclusive - 5 years - 506 graves; 1956-1960 inclusive - 5 years - 610 graves (m.429), and he stated this to mean an increase of 104 graves every five years or 208 graves every ten year period, being a rate of increase of sales over a ten year period of 18.9% (m.429).

141. That, per witness Mirza, Niagara County had a rate of growth during a similar period of 21.6% (m.430).

142. That witness Mirza did not accept or consider ^{as} valid a static rate of grave sales based on years 1951-1960 inclusive, which would have given the cemetery a remaining economic life of over 430 years (m.430-431).

143. That witness Mirza considered the life cycle of a cemetery to be divided into three periods:

- A) Development stage
- B) Productive stage
- C) Administrative stage (m.430).

144. That witness Mirza, using the rate of increase of 208 graves every ten years, computed the economic life remaining of the cemetery to be 163.6 years (m.432), with an average sale of 292.3 graves per year for 163.6 years (m.432).

145. That witness Mirza computed the annual net income as follows: \$44.02 net income per grave x 292.3 graves per year or a total of \$12,867.05 (m.432), which he used as an average net income spread over his analysis period of 163.6 years (m.432-433).

146. That witness Mirza gave no income credit for a \$35.00 interment and maintenance charge which was received by the claimant nor did he give any income credit for the \$25.00 paid to the gravedigger for the actual opening of the grave, thereby not considering \$60.00 of additional gross income per grave to the claimant cemetery.

147. That, if one adds the \$35.00 interment and maintenance fund collected to the \$44.02 net sale price per grave as computed by Mirza, one would attain a \$79.02 net income per grave x 292.3 graves per year average (per Mirza) or a net income average per year of \$23,097.55.

148. That, likewise, if one were to add both the \$35.00 interment and maintenance money received and the \$25.00 gravedigger charge paid to the Mirza profit of \$44.02 you would receive a net income per grave of \$104.02 x 292.3 graves per year sold for a net annual average income of \$30,405.05.

149. That witness Mirza capitalized net income of \$12,867.05 merely by dividing 6% into said sum of \$12,867.05 which produced a net worth of \$214,450.00 for remaining cemetery land, which per Mirza, was based upon a term of 163.6 years (m.433).

150. That, if the Mirza theory were adopted, using a 6% capitalization rate on a net sale price per grave of \$70.02 plus \$44.02 plus \$35.00 interment receipt or an annual average income of \$23,097.55 per year, would produce a net capitalized

worth of \$384,960.00 and using \$104.02 net sale price per grave (\$44.02 plus \$35.00 plus \$25 gravedigger collection) capitalized at 6% would give a value of unsold cemetery land of \$503,751.00.

151. That witness Mirza computed the area taken by the State as follows: Parcel 195 - 6.648 acres, in fee and Parcel 178 - 18.407 acres, in fee, total fee taking 25.055 acres without right of access to and from abutting property (m.434); In addition an easement of 0.198 acres was taken by the State for a water line making a total area affected of 25.253 acres (m.434).

152. That witness Mirza computed there were 37.048 acres left remaining after the appropriation which included all land sold and unsold (m.435.).

153. That he computed the unsold land remaining after the appropriation at 29.648 acres which he obtained by deducting the 25.253 acres appropriated from the total of 54.901 acres of unsold land which existed prior to the appropriation (m.435).

154. That the 25.253 acres appropriated constituted 45.99%, say 46% of the 54.901 acres of cemetery land unsold before the appropriation.

155. That witness Mirza stated that the highest and best use of the remainder parcel was for continued use as a cemetery (435).

156. That witness Mirza figured the unsold graves left after the appropriation were 25,823 unsold graves which he obtained by multiplying 29.648 unsold acres x 871 graves per acre (m.435-436); that he computed that it would take 109.5 years at an average rate of 237.34 graves per year to sell out these 25,823 unsold graves left remaining (m.436); that Mr. Mirza computed that the

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average annual net income from the sale of these graves out of the tract left remaining would be \$10,380 (m.436) which when capitalized at 6% amounted to \$172,713(m.436).

157. That witness Mirza subtracted \$172,000 (his capitalized value of the unappropriated unsold land) from \$214,500 (his capitalized value of the entire unsold area before the taking) and arrived at a net value of land appropriated of \$41,800 (m.436) by mere mathematics which constituted an artificial, unfair and inequitable technique.

158. That witness Mirza decided that the valuation of the unsold land area solely by the income approach "could not be economically justified" (m.437), and this Court concurs in this conclusion.

159. That Mr. Mirza figured that the graves sold during the years 1961 to 2060 would be as follows: in the beginning total graves unsold - 47,819 graves; ending inventory of graves 25,219 graves; - therefore total graves sold during 100 year period 22,600 graves (m.437). The average net income per year 226 graves x the same \$44.02 net per grave or a total annual net income of \$9,948.52 and capitalizing this at 6% for one hundred years amounted to a present worth of \$166,000 (m.438).

160. That witness Mirza stated this value of \$166,000 represented a land area of 25.947 acres (m.438) which he deducted from the unsold land area which existed before the taking of 54.901 acres, leaving an acreage remaining of 28.954 acres (m.438); he then valued these 28.954 acres at \$3000 per acre or a total of \$86,862 rounded off to \$87,000 (m.439); he then added this value of \$87,000 to his income valuation of \$166,000 for 25.947 acres making a total fair market value of the cemetery land of the 54.901 acres unsold before the taking of \$253,000 (m.439); he then determined

the remaining land left after the appropriation to be worth \$173,000 by the income approach, which he subtracted to make net damages \$80,000 (m.439), which he raised to \$82,030 (m.442), which was based on a hybrid and artificial appraisal technique and this court does not concur in the values obtained thereby.

161. That witness Mirza's technique and analysis was inherently based on the following reasoning.

a) That of the land remaining after the appropriation only the part not appropriated could be valued by the so-called income approach and that the part appropriated was only surplus land having a value of \$3000 per acre (m.439).

b) That in a sale period of 100 years only 22,600 graves would be sold (m.437);

c) That any graves sold at a profit after 100 years could not be considered in making an income approach valuation (m.437,438,439).

d) That in a 100 year sale period only graves lying within the unappropriated area would be sold (m.437).

e) That cemetery land, held in reserve and on purpose in accordance with a desire not to promote its sale, could not have any going concern value.

162. That Mr. Mirza stated he used a "market data approach" to arrive at "some value" (m.442) and under this "market approach" he considered selling the entire frontage as residential lots and valuing the rear land "as rear land, based on sales" (m.443).

163. That witness Mirza used the following considerations in valuing the land for residential purposes: he stated that an area of 12,000 sq. ft. or a depth of 150 feet would be sufficient

for septic tank purposes (m.448); he divided 2150 feet of frontage along Military Road into 27 building lots having 79.26 feet of frontage and he divided the Upper Mountain Road frontage of 1,130 feet into 14 building lots having 80.71 feet of frontage (m.448-449); making a total of forty-one building lots (m.449); Mr. Mirza valued Military Road frontage at \$35.00 per front foot, \$2800.00 per lot (80 feet front), and he valued Upper Mountain Road frontage at \$30.00 per front foot or \$2400.00 per lot, (m.449); Mr. Mirza stated that in twelve years there were twelve (12) building permits on Military Road and eighty-one (81) permits on Upper Mountain Road or a total of ninety-three (93) permits on Upper Mountain Road or a total of ninety-three (93) permits on the two roads over a ten year period (m.450); he estimated that it would take ten years to market the forty-one (41) lots (m.450) and he estimated a \$40.00 selling cost per lot (m.450); that, actually by applying 93 permits actually issued over a 10 year period, it would take less than 5 years to issue 41 permits on a comparative basis. He estimated that the first year sales would be five lots at \$2623.00 each, total \$13,115.00 and that the next nine years would be four lots at \$2,623.00 or \$10,492.00 per year (m.451).

164. That witness Mirza discounted the income from lot sales of \$94,428.00 for the second through tenth years of sales to \$54,936.00 (m.451).

165. That Mr. Mirza applied a discount rate of 41.82% to money received from the 2nd to the 9th year and he allowed no interest income on money received and retained over said 10 year period.

166. That he testified that the present value of the 41 building lots at the date of the taking to be \$68,000.00 (m.451) each. He stated that the 41 building lots would use up 11.295 acres leaving rear land of 13.958 acres (m.452) and he gave a value to the rear acreage of \$12,000.00 or \$860.00 per acre (m.453).

167. That State's witness Mirza was 32 years of age and graduated from Indiana University in 1959 (m.465); he was a salaried employee of the American Appraisal Company which performed about \$350,000.00 worth of work for the State of New York in the year 1963 (m.465); he had "no time to either buy or sell real estate" (m.466); he examined the cemetery site, apart from the seven (7) inspection dates for "between three and four weeks", "in the Buffalo area" (m.468); he did not investigate any of the costs or any of the statistics in the Gate of Heaven Cemetery at Lewiston, New York, adjacent to Holy Trinity Cemetery (m.470); he said that he probably "did look at all the cemeteries in the area" but stated this to mean the inclusion of cemeteries viewed by driving by them (m.472).

168. That prior to the State's taking, witness Mirza conceded that claimant's cemetery had frontages on the following:

- a) Upper Mountain Road;
- b) Military Road;
- c) Roberts Street;
- d) Riverdale Avenue; and

- 3) Ingress and egress to and from Lewiston Road
(m.474-475).

169. That witness Mirza testified that, prior to the State's taking, the cemetery patrons could come in from, and go out to either

- a) Lewiston Road, or,
- b) Military Road, or,
- c) Upper Mountain Road (m.477).

170. Mr. Mirza stated that "obviously an entrance is going to do something to a cemetery (m.482). And that further "the main objective is to align the cemetery to take the best advantage of all frontages and entrances and exits" (m.482).

171. That Mr. Mirza in his selling figure of \$80.75 per grave added nothing for the \$35.00 collected upon interment or the \$25.00 collected and paid the gravedigger, even though, in his figures, he charged against the \$80.75 per grave the cost of development and the cost of maintenance (m.486).

172. That witness Mirza admitted that he knew prior to the trial that his figures concerning grave income did not include the \$60.00 per grave received over and above the grave sale price (m.488); that he also heard the same figures repeated in the course of the trial, prior to his own testimony (m.488).

173. That witness Mirza did not check any records of the development costs either for the Gate of Heaven cemetery or the Riverdale Cemetery which were adjacent cemeteries, the latter operated on a non-sectarian basis and the former on a sectarian basis (m.498), even though each of these cemeteries had public trials involving appropriations of cemetery land (m.498-499).

174. That witness Mirza testified that, if the \$35.00 maintenance costs collected upon each interment were added to his selling price at \$80.75 per grave, a gross income of \$115.75 per grave would result (m.502); that, applying the \$115.75 gross sale price per grave, x 870 graves per acre would result in a gross sale price of \$100,818.25 per acre (m.502), instead of \$70,333.25 gross sale amount per acre computed at \$80.75 per grave (m.500); that, although he applied a 5% of the gross income per acre as a selling cost he stated that the flat sum figure of \$3,516.66 selling cost per acre was a reasonable sum (m.504); that, if Mirza's proposed selling costs were deducted from other than his proposed total acreage expense of \$31,989.97 it would reduce, mathematically, his total expenses per acre to approximately \$28,400.00 (m.504); that, if said expense figure of \$28,400.00 were deducted from the sale price of \$100,818.25 per acre, it would result in a figure of \$71,600.00 net income per acre (m.505), instead of the net income per acre of \$38,343.28 (m.501).

175. That an application of witness Mirza's estimate of the sale of 871 graves per acre to his figure of \$71,600.00 net income per acre of graves sold results in a net income per grave of approximately \$83.00, instead of \$44.02 per grave; that a computation using Mirza's basis would be as follows: \$110,818.25 income from sale of graves at \$115.75 per grave less \$28,473.31 cost per acre (if selling costs were eliminated) or a net difference of \$72,344.94, which, when divided by 871 graves, results in a net price per grave of \$83.00.

176. That witness Mirza affirmed that "a great deal depends on the net income from the sale of a burial rite, yes" (m.506).

177. That under the Mirza formula that 292.3 graves (average) would be sold each year, the multiplication of this amount by \$83.00 net income per grave (instead of \$44.02) would result in a net income per year of \$24,260.90 instead of \$12,867.05 (m.505).

178. That witness Mirza capitalized his net income of \$12,867.05 by 6% which he estimated would be the amount necessary to produce a return on both interest and principal over the next 163 years (m.506) and the result of his capitalizations came to \$214,450.00 (m.506).

179. That an income stream of \$24,260.90 were capitalized in the same Mirza manner at 6% the amount produced would be \$404,348.40 (m.507)

180. That witness Mirza testified that in both the Mt. Hope and St. Agnes cemetery cases the Court used a 2% capitalization rate (m.509) and if the claimant, Holy Trinity Cemetery, were capitalized at 2% using his income figure of \$12,867.05 per year, the capital value of unsold acreage would be \$643,350.00 for 54.901 acres (m.509); at 3% this same figure would be \$428,900.00; at 4% it would amount to \$321,676.00 (m.510).

181. That Mr. Mirza computed that the 25.253 acres taken from claimant was 46.5% of the 54.901 acres remaining unsold (m.510).

182. That if he had applied the 46% land ratio to the \$404,348.40 capitalized value computed at the rate of \$83.00 net income per grave at a 6% rate the resultant figure, would be \$186,000.26 for the 25.253 acres appropriated.

183. Mr. Mirza conceded that the cemetery was on two major roads, Upper Mountain Road and Military Road (m.513); that he valued the portion not taken by the State (29.648) acres at a different sell-out term (109.5) years, at a different grave rate (237.345 graves per year), and a different net income per year i.e. \$10,380.00.(m.515-516), leaving a difference of approximately \$41,800.00 for the portion of land taken (m.436,516).

184. That, in Mr. Mirza's approach it appears that, with less grave sales per year (237.34 graves vs. 292.3 graves); fewer years to sell out (109.5 years to sell out 29.64 acres vs.

163.6 years to sell out 54.901 acres) and with less net profit per year (\$10,380 per year vs. \$12,867.05 per year), he attributes a value of \$173,000.00 to the remaining unsold portion (m.516) and then merely subtracts this figure from \$214,450.00, stating that the balance can only be worth about \$41,800.00.

185. That witness Mirza adopted this approach in spite of the fact that he testified that any part of the cemetery could have been developed leaving only a small area around frontal roadways.

186. That, in brief, State's witness Mirza's theory of valuation depends on the technique that he made a preliminary and condition precedent determination that the land taken by the State was practically of "throw-away" value; that he refused or failed to take into consideration the present value of lands available for future cemetery use, even though he considered it usable cemetery land (519).

187. That Mr. Mirza was unable to find any sales of cemetery land from one religious cemetery corporation to another (520-528),

and he agreed with the claimant's witness Bowen to the effect that religious corporations do not wish to dispose of their cemetery land and have "no intention of selling it" and on "rare occasions do they buy and sell on the open real estate market" (m.521).

188. That Mr. Mirza further stated that they (religious cemeteries) are under no compulsion to sell and "they can hold that land for hundreds of years with virtually no costs in the interim period" (m.521)

189. That he stated that a religious cemetery corporation could restrict its sales to its own member (m.522) and conceded that it was "a very valuable thing" for a religious cemetery corporation to be able to determine what it wanted to retain and what and when it wanted to develop land (m.523).

190. Mr. Mirza allowed no income return on the money which had accrued in the maintenance fund (m.524).

191. That Mr. Mirza used sale prices of individual residential lots on streets that had no corner influence with regard to Upper Mountain Road and Military Road (m.531,532,533); that he used no lot sales on Military Road but referred to lots in a subdivision lying northeast of Military Road (m.533).

192. That as to Military Road he stated that he reduced his price range of \$40.00 - \$45.00 a front foot to \$35.00 per front foot (m.533); that all of his reference sales were residential lots (m.533); that he was in the Niagara Falls area "approximately two or three weeks" investigating these sales (m.534).

193. That State's witness Mirza did not investigate Sale No. 1 listed on the claimant's Notice of Sales, being a sale from Johnson to the State Power Authority (m.536), and in fact, did not check any of the claimant's listed comparable sales (m.536).

195. That, upon later testimony, witness Mirza states he did examine the sale by the Power Authority of the State of New York to Mount St. Mary's Hospital of 27.217 acres for \$95,000.00 under a 1962 deed pursuant to a 1960 contract (m.538); that he conceded there were two pages of restrictions plus a buy back privilege in favor of the grantor contained in deed to the Hospital grantee (m.541); that he agreed that the Mount St. Mary's Hospital property commenced on the southwesterly side of Military Road 150.46 feet northwest of the intersection of Military Road and Upper Mountain Road and had approximately 1100 feet of frontage along Military Road (m.542) where as the Claimant Holy Trinity Cemetery property had a combined frontage of 3280 feet (m.542).

195. That witness Mirza conceded that computations showed that the claimant's property had a ratio of 130 front feet per acre with relation to the 25.253 acres taken (m.543), whereas the Mount St. Mary's Hospital property had approximately 42 front feet per acre with relation to the 27.271 acres conveyed to it by the State Power Authority (m.544).

196. That the Claimant's appropriated acreage had about three times more front footage per acre than did Mount St. Mary's Hospital acreage purchased (m.544), and in his analysis he stated that frontage for hospital use was "not desirable" (m.546) but witness Mirza valued what he termed "rear acreage" by his other three acreage sales (exclusive of the aforesaid Hospital purchase) at only \$860.00 per acre.

197. That of his four acreage sales Mr. Mirza thought the Mount St. Mary's Hospital purchase was "probably the most comparable" to the land appropriated (m.545) and he thought that the Holy Trinity property had "about the same utility" as a corner property (m.548).

198. That Mr. Mirza affirmed that he charged about a \$40,000.00 discount over a nine year period of residential lot sales (m.550).

199. That witness Mirza stated that the mandatory two year development time limitation in the Mount St. Mary's Hospital deed meant that the purchaser could not sell it to someone "who might develop it in a means not compatible to your own development" (m.554).

200. That the restrictions contained in the aforesaid conveyance to Mount St. Mary's Hospital inured to the benefit of the seller who reserved and controlled the use of the land after its sale and which indicated that the land unencumbered by restrictions and covenants was worth more on an open market (m.554).

201. That witness Mirza said that a "summation method of selecting a capitalization rate" must be used because of lack of market data to establish a capitalization rate (m.558).

202. That he used the following component parts for his capitalization rate:

1. The safe rate or non-risk rate (2) rate for lack of safety or risk rate (3) rate for non-liquidity and (4) rate for burden of management (m.559).

203. That for the safe rate he used 3% being the State of New York bond issue rate (561); then he stated that the death rate was dropping from 17.7 per thousand in 1910 to 9.5 per thousand in 1960 (m.561) and that the risk rate should be 1.5% which was a difference between a long term bond yield of

4.0% and a short term bond yield of 4.0% and a short term bond yield of 2.5% (m.564); that he then determined that the risk rate for non-liquidity should be 1.0% because of the period that such money would be non-liquid in his estimation, (m.565); he then added 0.5% for the burden of management (m.566); his summary is 6% (m.567).

204. That State's witness Mirza, in all of his computations rests his figures upon the basis that the portion to be appropriated would be the last to be developed (m.574), even though he testified that the cemetery could be developed by roadways in any direction (m.575).

205. That he also stated that cemeteries are slow in developing along boundary lines and he mentioned one or two instances which were the cemeteries that he had examined for litigation purposes (m.568) but that, as a matter of which judicial notice will be taken, there are many established cemeteries in the Western New York area which have interior land remaining unsold but which are developed to road frontage boundaries; for example, Forest Lawn Cemetery at Buffalo, New York; the Catholic, Protestant, and Jewish Cemeteries in the Pine Ridge Road region in the Town of Cheektowaga, Erie County.

206. That Mr. Mirza again stated that he charged \$17,583.31 for maintenance costs per acre, but gave no credit for the money paid for permanent care or interments (m.577) even though the cost of interment was charged out as a cemetery expense (m.578); witness Mirza admitted that he would have included it in his appraisal

had he known about it at the time he prepared his appraisal (m.579).

207. That the fundamental thesis and theory of State's witness Mirza are faulty, because on the one hand he estimates an expected profit per acre after charging all foreseeable and anticipated risks, care, and maintenance, but, then, on the other hand, by adding factors and increments of risk, non-liquidity and elapsed time to a capitalization rate he is in fact duplicating and overlapping items of expense; that at no point in his formula does he allow credit for the reinvestment income from the money which is returned each year under his 6% combined recovery of principal and interest thereon so that his straight line 6% capitalization rate in perpetuity has, perforce, to be erroneous.

208. That to apply a capitalization rate is error and there should be applied herein a discount rate based on the present value of future money.

209. Mr. Mirza stated that he valued the land as cemetery except the part he could not economically justify as cemetery land and he valued that portion on the basis of adjoining non-cemetery land (m.583) but this Court finds that the land appropriated by the State herein was not surplus land, and the cemetery was being developed in the direction of major road frontages and in accordance with the direction of the deed acquisitions.

210. That the cemetery has suffered severance and consequential damages for the following reasons:

a) The symmetry and development plan of the cemetery including its availability of entrances and exits has been affected adversely.

b) The State's witnesses admitted that at least "some" flow of water off the property had been impeded by the Expressway which thereby resulted in increased pondage and flooding.

c) The said pondage and flooding had enlarged and deepened after the construction of the Expressway by the State, but before the installation of the fill and raised road by the claimant in the southwest area of the residual property.

d) The claimant was entitled to install a road or roads on its residual property to connect with Roberts Street and restore a lost entrance and exit and was under no legal duty to refrain from building such road in order to prevent pondage and flooding; moreover by using the road and installing fill claimant did what was reasonably necessary to mitigate pondage and flooding.

e) The State by the offer of fill indicated that it had knowledge that a pondage and flooding condition had occurred on claimant's residual land; that the fill offered was unsuitable for its intended use.

f) That the claimant was required to install earth fill to eliminate and/or alleviate areas of flooding.

211. That the Court has viewed the property.

CLAIMANT'S PROPOSED
CONCLUSIONS OF LAW

1. That the highest and best use of the claimant's property and the premises appropriated was for cemetery purposes.
2. That cemetery land has a unique real estate market but there are certain sales of cemetery land (apart from merely vacant land) located in the Western New York area and cited by the claimant herein which, when adjusted for differentiating characteristics and circumstances, do furnish a basis for determining the market value of cemetery land.
3. That the appraisers both for the claimant and the State found that owners of existing cemetery land are reluctant to sell their cemeteries voluntarily to prospective purchasers and this factor indicates that cemeteries had a premium value over and above their value as land only.
4. That a strict income approach of valuation should not, in fairness, be applied to a cemetery owned by a religious corporation which deliberately conserves its cemetery land for a future and long-term use instead of attempting to sell out the cemetery land for graves in the shortest possible time.
5. That the premises appropriated were worth the value of \$20,000.00 per acre at the time of said appropriations.
6. That the claimant sustained and is awarded direct damages of \$505,060.00 computed as follows:

- a) For Map 5, Parcel 195; 6.648± acres;-
the sum of \$132,960 with interest thereon
from the 8th day of August 1960 to the
8th day of February 1961 and from the
6th day of August 1962 to the date of
entry of judgment herein.

b) For Map 173, Parcel 178, 18.407± acres; - the sum of \$368,140.00 with interest thereon from the 26th day of September 1960 to the 26th day of March 1961 and from the 6th day of August 1963 to the date of entry of judgment herein.

c) For Map 39, - Parcel 226, - 0.198± acre - the sum of \$3,960.00 with interest thereon from the 28th day of August 1962 to the 28th day of February 1963 and from the 15th day of April 1964 to the date of entry of judgment herein.

7. That the claimant has also sustained and is awarded severance and consequential damages to its residual property in the sum of \$70,222.50 computed as follows:

a) , For damages to the market value of residual land \$29,000.00 by reason of loss of "suitable" ingress and egress and for destruction of symmetry and loss of grave sites due to an angled appropriation line.

b) For damages equal to the cost of earth fill and a drainage system needed to eliminate pondage and flooding caused by the State construction.

c) Said sums shall bear interest from the 26th day of September 1960 (the date of second fee map filing) to the 26th day of March 1961 and from the 6th day of August 1962 to the date of entry of judgment.

8. That, therefore, the total damages herewith awarded to the claimant is the sum of \$575,282.50 plus the aforesaid applicable interest.

9. The award to claimant herein is exclusive of the claims, if any, of persons other than owners of the appropriated property, their tenants, mortgagees and lienors having any right or interest in any stream, lake, drainage and irrigation ditch or channel, street, road, highway, or public or private right of way or the bed thereof within the limits of the appropriated property or contiguous thereto; and is exclusive also of claims, if any, for the value of or damage to easements and appurtenant

facilities for the construction, operation and maintenance of publicly owned or public service electric, telephone, telegraph, pipe, water and sewer and railroad lines.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Respectfully submitted,

Victor E. Manz

Dated: July 28, 1965.

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